90-1850

No. _____

Supreme Court, U.S.
FILED
APR 29 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JOSE M. PERALES -
PETITIONER

VS

MABSTOA and NEW YORK CITY TRANSIT AUTHORITY -
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jose M. Perales
Pro-Se
1657 Wallace Avenue
Bronx, New York 10462
(212) 584-2157

QUESTION PRESENTED

Should an Arbitrator's Award that exceeds the limits of the arbitrator's authority; which failed to draw its essence from the parties' collective bargaining agreement, and violates the Fourth, Sixth, and Fourteenth Amendments to the United States Constitution be considered a legitimate reason to dismiss a twelve year employee, and should the arbitrator's award be vacated?

QUESTION PRESENTED

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1990

Jose M. Perales, Petitioner

vs

MABSTOA and
New York City Transit Authority, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Jose M. Perales, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit that Mr. Perales was dismissed for a legitimate consideration such as an Arbitration Award (June 30, 1986).

No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1990

_____,

Petitioner,

v.

_____,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINION BELOW

The unpublished summary order of the Court of Appeals Jose M. Perales v. MABSTOA and New York City Transit Authority, (90-7500), appears in Appendix A to this Petition. The opinion of the District Court for the Southern District of New York: Jose M. Perales v. MABSTOA and New York City Transit Authority, (87-cv-5067), appears in Appendix B.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on November 28, 1990. A timely Petition for rehearing in Banc was filed on December 10, 1990. The Court of Appeals' denial of the Suggestion for Rehearing in Banc was issued on January 30, 1991 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28 U.S.C. §§ 41, 1921-94.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Amendment IV to the United States Constitution is set forth in Appendix E.

Amendment VI to the United States

OPINION BELOW

The unpublished summary order of the Court of Appeals (Jose R. Perales v. DIRECTOR and New York City Transit Authority, 00-7800, appears in Appendix A to this Petition. The opinion of the District Court for the Southern District of New York, Jose R. Perales v. DIRECTOR and New York City Transit Authority (07-cv-5067), appears in Appendix B.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on November 28, 1990. A timely petition for rehearing in banc was filed on December 10, 1990. The Court of Appeals denied the Suggestion for Rehearing In Banc on January 00, 1991 and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

[illegible]

Constitution is set forth in Appendix E.

Amendment VII to the United States Constitution is set forth in Appendix F.

Amendment XIV to the United States Constitution is set forth in Appendix F.

STATEMENT OF THE CASE

The United States District Court, Southern District of New York, has jurisdiction pursuant to Title VII of the Civil Rights Act of 1964, as amended, for employment discrimination. Jurisdiction is specifically conferred on this Court by 42 U.S.C. § 2000e-5. Equitable and other relief are also sought under 42 U.S.C. § 2000e-5(g). Jurisdiction is also based on 42 U.S.C. §§ 1981 et seq. and 28 U.S.C. §§ 1331, 1343.

On April 16, 1990 my Case was heard by United States District Court for the Southern District of New York. Case docket number 87-cv-5067, Judge Metzner presiding. The District Court decided that I had been dismissed for a legitimate reason. The District Court based its decision on John Zuccotti's Arbitration Award June 30, 1986.

My appeal was heard on November 27, 1990 in the United States Court of Appeals for the Second Circuit. Case docket number 90-7500, presiding: Hon. Frank X. Altimari, Hon. J. Daniel Mahoney, Circuit Judges, Hon. I. Leo Glasser, District Judge.

The Appeals Court Panel takes the erroneous stand that my dismissal was not motivated by race discrimination, but rather legitimate considerations such as an arbitrator's award.

The decision is based only on the the seven line opinion and award of the Arbitrator's Award of June 30, 1986. The Arbitrator's Award appears in Appendix D. John Zuccotti the arbitrator states:

> "Mr. Perales was dismissed on December 10, 1985 on multiple charges regarding his refusal to submit to urinalysis in conjunction with his annual physical."

On December 10, 1985 there was no statutory law, or contractual agreement which gave the Arbitrator the legal right to dismiss me for the above reasons. The Arbitrator refers to multiple unspecified charges and the refusal of

a urinalysis test. The Arbitrator does not state what the specific multiple charges are, nor does the Arbitrator state, that urine test is for a Drug Test.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: This Petition presents an issue resolved by this Court; This Court has refused to enforce a Labor Arbitration Award on public law and policy grounds. The Court has denied a writ of certiorari on March 18, 1991; Docket No. 90-1166 Long Island Typographical Union No 915 v. Newsday Inc 1/3/91, CA 2 (915 F2d 840, 59 LW 2238, 135 LRRM 2659) Labor-arbitration-court's refusal to enforce award on public law and policy grounds.

This Petition presents an issue specifically and unequivocally decided by the Second Circuit Court. The Opinion conflicts with the decision in my case by the Second Circuit Court, which bases its decision solely on the Arbitrator's Award. The Seventh Amendment of the Constitution, in lawsuits based on common law (the body of legal principles based on past court

cases rather than statutes passed by legislatures).

The Second Circuit Court explicitly upheld that an arbitrator's award can be vacated when it exceeded the limits of the arbitrator's authority; and it failed to draw its essence from the parties' collective bargaining agreement. In Newsday v. Long Island Typographical Union, 915 F.2d 840 (2nd Cir. 1990) The Court Stated:

> [3] "Nevertheless, a court may refuse to enforce an arbitrator's award under a collective bargaining agreement if the award is contrary to public policy. *Id* at 42, 108 S.Ct. at 373. This is a specific application of a more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. *Id.*" However,
> [A] court's refusal to enforce an arbitrator's interpretation of such contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.'"

This Court should grant certiorari here to explicitly rule that an Arbitrator's Award shall

not violate the Bill of Rights of the Constitution of the United States of America. IV Amendment to the United States Constitution for a person to be free from unreasonable searches, but upon probable cause. On December 10, 1985 there were no statutory laws, or contractual agreement giving my employer the right to submit an employee to random drug testing. The VI Amendment of the Constitution, to be informed of the nature and cause of the accusation. Arbitrator Zuccotti's Award,

> "Mr. Perales was dismissed on December 10, 1985 on multiple charges regarding his refusal to submit to urinalysis etc. . ."

These are not specific charges and are not clearly defined charges. The collective bargaining agreement in force on December 10, 1985 did not state that we had to submit to random, or yearly drug testing. The XIV Amendment to the United States Constitution, nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its

jurisdiction the equal protection of the law. I was not previously informed that I was going to be given a Drug Test, nor was there any probable cause. There was no suspicion of the petitioner being under the influence of drugs.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals in this matter. [1]

Dated New York, New York April 27, 1991

Respectfully submitted

Jose M. Perales

Jose M. Perales
Pro-Se

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[1] If this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue and the matter be remanded to the Court of Appeals for redetermination in light of the Court of Appeals opinion in Newsday v. Long Island Typographical Union, (2nd Cir. 1990).

FXA

SDNY
87-cv-5067
METZNER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York, on the 28th day of November, one thousand nine hundred and ninety.

PRESENT:

HON. FRANK X. ALTIMARI,

HON. J. DANIEL MAHONEY,

Circuit Judges,

HON. I. LEO GLASSER,

District Judge,

(U.S. District Court for the Eastern District of New York, sitting by designation).

FILED

NOV 28, 1990

----------X

JOSE M. PERALES,

Plaintiff-appellant

-against-

90-7500

MABSTOA and NEW YORK CITY TRANSIT AUTHORITY,

Defendants-appellees.

----------X

Appeal from the United States District court for the Southern District of New York.

This case came to be heard on the transcript of record from the United States District Court for the Southern District of New York (Charles M. Metzner, Judge).

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the district court's entry of judgment dismissing plaintiff's complaint is AFFIRMED.

Plaintiff - appellant, Jose M. Perales, challenges the district court's determination that he failed to sustain his claim that defendants discriminated against him in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2. After conducting a bench trial, the district court concluded that plaintiff failed to offer any proof that his dismissal was motivated by race rather than by legitimate considerations such as Perales' failure to submit to a drug test.

A plaintiff must prove four elements in

order to establish a prima facie case of discrimination. Plaintiff must show that (1) he or she belongs to a protected class; (2) his or her job performance was satisfactory; (3) he or she was discharged; and (4) the position was filled by someone who had complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Haskell v. Kamen Corp., 743 F.2d 113, 119 n.1 (2d Cit. 1984). We agree with the district court that plaintiff has failed to make out a prima facie case p of discrimination.

We have reviewed all of the plaintiff's arguments and find them to be without merit

AFFIRMED.

HON. FRANK X. ALTIMARI,

HON. J. DANIEL MAHONEY,

Circuit Judges,

HON. I. LEO GLASSER,

District Judge.

N.B.: This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DOC # 31

- - - - - - - - - - - - - - - - -X

JOSE M. PERALES,

Plaintiff,

-against-

MABSTOA and NEW YORK CITY TRANSIT AUTHORITY

Defendant.

- - - - - - - - - - - - - - - - -X

66070

OPINION

87 civ. 5067

(CMM)

METZNER, Senior District Judge:

Plaintiff, Jose Perales, instituted this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, seeking reinstatement in his employment and damages from his employers, the defendants MABSTOA and the New York City Transit Authority. He had been employed as a bus driver and claims that he was harassed and discharged because he is Hispanic.

Plaintiff started his employment as a bus driver in 1973. On February 12, 1982, he received a notice of violation charging insubordination. Plaintiff, accompanied by Fried,

the shop steward of his union, met on February 17, 1982, with Horn, defendant's employee in charge of the garage out of which plaintiff worked. After the hearing, plaintiff was dismissed, but action was suspended on application of Fried pending the disposition of the appeal provided by the grievance procedure.

The next action that was taken against plaintiff occurred on April 8, 1982, when the dispatcher at the garage gave plaintiff a note to appear with his union representative before Horn at 1:15 that day. Plaintiff's work day ended at 1:15 P.M. Plaintiff wrote on the note, "Cannot keep appointment today."

The next day, April 9, 1982, he received another note from the dispatcher again requesting plaintiff and his union representative to meet with Horn at 1:15 that afternoon. Plaintiff refused to see Horn on "his (plaintiff's) time," and that he did not know what it was all about.

On April 13, 1982, Plaintiff received a third note from his dispatcher to appear at

Horn's office with the union representative at 1: 15 P.M. that afternoon. This note further stated that failure to appear would result in plaintiff not being able to work. He was also told to sign this note and return it to dispatcher. Plaintiff refused to sign the note and failed to appear as requested.

On April 19, 1982, Plaintiff was dismissed because he failed to appear for disciplinary proceedings. Fried, the union representative, was present at the hearing and indicated that he would appeal this decision.

Appeals were taken from this dismissal and the dismissal of February 12, 1982, pursuant to the grievance procedure. On May 13, 1982, both dismissals were upheld at a hearing, but plaintiff was reinstated to his position. He lost pay for the period from April 19, 1982, the date of the second dismissal, to his reinstatement on May 14, 1982. The union representative accepted the reinstatement and plaintiff indicated he would appeal the failure to receive back pay. This determination

upholding the violations was taken to arbitration pursuant to the grievance procedure. The arbitrator, John Zuccotti, on April 15, 1983, sustained the finding of violations, but awarded two days' back pay.

The next significant action took place on December 10, 1985. Plaintiff was ordered to report for his annual physical examination. He refused to furnish a urine sample on the ground that it was for a drug test, and that since there had been no complaint against him of drug usage, he would only furnish that sample at St. Clare's Hospital. I gather he had some fear that the sample would be tampered with, and that an improper positive finding would be made of the urinalysis.

Because of this refusal by plaintiff, he was first suspended and then dismissed by his supervisor after a hearing on December 10, 1985, at which a union representative was present. This determination was appealed and sustained on December 17, 1985, at which time a hearing was held with the plaintiff and a union

representative present. At this hearing, for the first time, plaintiff indicated that he believed his civil rights were being violated. Finally, on June 30, 1988, the impartial arbitrator, after plaintiff again declined to take a urine test, sustained the Authority's decision to dismiss plaintiff.

The genesis of plaintiff's claim of discriminatory action because he is Hispanic, appears to be the posting in August, 1981, by the union of a list at the garage naming twelve people who did not contribute $5 to a fund to be used to pay the expenses of the Local's representatives at the annual convention in California.

Plaintiff states that he and another employee listed were Hispanics, and that the two of them ultimately were discharged. There is no proof as to the basis of the dismissal of the other Hispanic. In any event, the listing of the delinquents was not an action of the defendant. It was an action by plaintiff's own union which represented him through all of the grievance

procedures outlined above. I cannot find a nexus between the listing and what followed in the next four years during the course of plaintiff's employment.

I find that on the record before this court plaintiff has failed to sustain his claim.

The complaint is dismissed.[1]

So ordered.

Dated: New York, N.Y.
May 10, 1990

Charles M. Metzner
U.S.D.J.

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[1]The court has received a letter from the pro se office which plaintiff wrote after the trial. He claims that there was an agreement at the pretrial conference on April 12, 1990 by the lawyers that the defense would present its case on Tuesday, April 17, 1990. The fact is that the court directed counsel for the defendant to have all its witnesses present on Monday, since it was obvious

this was a one-day case. He also charges that Judge Wood assigned the case to this court to benefit MABSTOA. This, of course, is not so.

United States Court of Appeals

For the

Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Thirtieth day of January , one thousand nine hundred and ninety-one.

JOSE M. PERALES,

Plaintiff-Appellant,

-v-

MABSTOA and NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees

Docket Number: 90-7500

FILED

JAN 30, 1991

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Jose M. Perales, Pro Se,

United States Court of Appeals

For the

Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the Thirtieth day of January , one thousand nine hundred and ninety-one.

JOSE M. PERALES,

Plaintiff-Appellant,

Docket Number 90-7500

-v-

FILED

JAN 30, 1991

PORT AUTHORITY TRANS-HUDSON and NEW YORK CITY TRANSIT AUTHORITY,

Defendants-Appellees

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Jose M. Perales, Pro

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

by Lena Eve Brier
Chief Deputy Clerk

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the Judges of the court in regular active service and to any other Judge that heard the appeal and that no such Judge has requested that a vote be taken thereon.

ELAINE L. CHUKWUMERIJIE
Clerk

by Lena Bye Butler
Chief Deputy Clerk

6. J. Perales, Bus Operator, Payroll No. 3822-01459

Mr. Perales was dismissed on December 10, 1985 on multiple charges regarding his refusal to submit to urinalysis in conjunction with his annual physical. During the course of the hearing, Mr. Perales again declined to take a urine test. On the basis of his refusal to submit to testing, I will not overturn the Authority's decision to dismiss Mr. Perales, and I so award.

John E. Zuccotti
Impartial Arbitrator

Dated: New York, New York
June 30, 1986

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

On this 30th day of June, 1986, before me personally appeared JOHN E. ZUCCOTTI, to be known to me to be the person described in and who executed the foregoing document, and he personally acknowledged to me that he executed the same.

Notary Public

LENORA SILVERS

Notary Public, State of New York

No 24-9005285

Qualified in Queens County

Commission Expires Dec. 31, 1988

Notary Public

LENORA SILVERS

Notary Public, State of New York

No 24-5005868

Qualified in Queens County

Commission Expires Dec. 31, 1988

AMENDMENT IV TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be search, and the persons or things to be seized.

AMENDMENT VI TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witness in his favor, and to have the assistance of counsel for his defense.

AMENDMENT VII TO THE UNITED STATES CONSTITUTION

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trail by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to rules of common law.

AMENDMENT XIV TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.